KOO WING CHEUNG & ANOR A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
[CRIMINAL APPEAL NO: B-05-79-2011]
23 JULY 2013 C

CRIMINAL LAW: *Dangerous drugs - Possession - Appeal against conviction - Surveillance by police - Nothing incriminating found on accused persons nor bedroom they were arrested in - Drugs found in two separate places in house - Other persons had custody, control and access* D *of house - Whether trial judge considered possibility that other persons could have placed drugs - Whether accused persons had knowledge of drugs - Whether presumption of possession rebutted - Whether conviction unsafe - Dangerous Drugs Act 1952, s. 12(2)*

CRIMINAL PROCEDURE: *Appeal - Dangerous Drugs, possession of* E *- Surveillance by police - Nothing incriminating found on accused persons nor bedroom they were arrested in - Drugs found in two separate places in house - Whether accused persons had knowledge of drugs - Evidence that other persons had custody, control and access of house - Whether* F *trial judge considered possibility that other persons could have placed drugs - Whether presumption of possession rebutted - Whether conviction unsafe - Dangerous Drugs Act 1952, ss. 39B(1)(a), 12(2)*

The first and second appellants were both charged in the High Court for trafficking in 54.1 grammes of methamphetamine, an G offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). A surveillance was carried out by the police on a double-storey house ('the said house') whereby the appellants were arrested in the master bedroom on the upper floor. However, nothing incriminating was found on both the appellants H nor in the master bedroom where they were arrested in. A thorough search conducted in the house led to the discovery of the drugs hidden in two separate places, namely: (i) 33 grammes in a bottle ('exh. P57') inside a kitchen cabinet on the ground floor; and (ii) 21.1 grammes in a plastic container ('exh. P77') in the I

A cupboard in the second room on the upper floor. The defence of both the appellants was that they had never seen the said drugs at any time before the raid and had no knowledge of the same. They were shifting into the said house which belonged to one Chee Chai but were not given any house keys. The first appellant B testified that one Or Chi Kwan ('DW3') stayed in a room on the ground floor and that Chee Chai stayed in a room on the upper floor opposite the master bedroom. DW3, on the other hand, testified that he had seen exh. P77 before the appellants shifted in and that Chee Chai had also wrote the words 'do not touch' C and pasted the same on exh. P57 and told him not to touch it. At the conclusion of the trial, the trial judge found that the appellants could not be said to be trafficking in the drugs but convicted the appellants with one of possession under s. 12(2) of the DDA. Both the appellants were sentenced to 18 years D imprisonment. The first appellant was also sentenced to the mandatory ten strokes of whipping. Hence, the present appeal. The primary issue that arose for the court's adjudication was whether the trial judge had erred in finding the appellants guilty of the possession charge. It was argued that the drugs found in E the kitchen and the room belonged to Chee Chai. Therefore, it was further submitted that the trial judge had failed to appreciate that the defence had created a reasonable doubt and/or rebutted the presumption of possession on the part of both appellants.

F **Held (allowing appeal; acquitting and discharging appellants)**
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) Both the appellants were arrested in the master bedroom. There were no drugs recovered in the master bedroom. No G keys to the said house were recovered from either of the appellants. In this regard, mere presence in one of the four rooms of the house, without more, did not show that both the appellants had or appeared to have the care or management of the house and the presumption that they were H occupiers could not be raised. (para 19)

(2) The appellants' convictions were wholly unsafe. There was evidence that other persons had custody and control of the house and hence, had access to the house. The evidence I

pointed to the possibility of some other persons who could have placed the drugs there. DW3 stayed in the room next to the kitchen while Chee Chai who was the occupier of the said house, was in the possession of exh. P57 and it was Chee Chai who had written the words 'do not touch' and pasted the same on exh. P57. There was also evidence that Chee Chai had possession of exh. P77 whereby a few days before, he had offered the drugs contained in exh. P77 to DW3 and two others. However, the trial judge failed to critically and judicially appreciate the entire evidence in favour of the appellants. This was a serious non-direction which amounted to a misdirection by the court below, warranting appellate intervention. (paras 19 & 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu pertama dan kedua, kedua-duanya telah dituduh di Mahkamah Tinggi kerana mengedar 54.1 gram methamphetamine, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Satu pengawasan telah dijalankan oleh pihak polis ke atas sebuah rumah dua tingkat ('rumah tersebut') di mana perayu-perayu telah ditahan di dalam bilik tidur utama di tingkat atas. Walau bagaimanapun, tiada apa-apa barang salah didapati daripada kedua-dua perayu mahu pun dari bilik tidur utama di mana mereka ditahan. Satu carian menyeluruh yang dijalankan dalam rumah tersebut membawa kepada penemuan dadah-dadah yang disembunyikan di dua tempat berasingan, iaitu: (i) 33 gram dalam botol ('eks. P57') di dalam kabinet dapur di tingkat bawah; dan (ii) 21.1 gram dalam bekas plastik ('eks. P77') di dalam almari di bilik kedua di tingkat atas. Pembelaan kedua-dua perayu adalah bahawa mereka tidak pernah melihat dadah-dadah tersebut pada bila-bila masa sebelum serbuan tersebut dan tidak mempunyai pengetahuan mengenainya. Mereka sedang berpindah masuk ke dalam rumah tersebut yang mana dimiliki oleh seorang yang bernama Chee Hai tetapi tidak diberikan kunci rumah. Perayu pertama memberi keterangan bahawa seorang yang bernama Or Chi Kwan ('DW3') menghuni sebuah bilik di tingkat bawah dan bahawa Chee Hai menghuni sebuah bilik di tingkat atas berhadapan dengan bilik tidur utama. DW3, sebaliknya, memberi keterangan bahawa dia telah melihat eks. P77 sebelum perayu-perayu berpindah masuk dan bahawa Chee Hai juga telah menulis perkataan 'jangan sentuh' dan melekatkannya pada eks. P57 dan

memberitahunya agar tidak menyentuhnya. Di akhir perbicaraan, hakim bicara memutuskan bahawa perayu-perayu tidak boleh dikatakan mengedar dadah-dadah tersebut tetapi menyabitkan perayu-perayu dengan kesalahan milikan di bawah s. 12(2) ADB. Kedua-dua perayu dijatuhkan hukuman 18 tahun penjara. Perayu pertama juga dijatuhkan hukuman mandatori sepuluh kali sebatan. Oleh itu, rayuan ini. Isu utama yang timbul untuk diputuskan oleh mahkamah adalah sama ada hakim bicara terkhilaf dalam memutuskan bahawa perayu-perayu bersalah dalam pertuduhan milikan. Adalah dihujahkan bahawa dadah-dadah yang dijumpai di dalam dapur dan bilik tersebut, dimiliki oleh Chee Hai. Oleh itu, dihujahkan selanjutnya hakim bicara gagal dalam menimbangkan bahawa pembelaan telah menimbulkan keraguan dan/atau menyangkal anggapan milikan di pihak kedua-dua perayu.

Diputuskan (membenarkan rayuan; melepaskan dan membebaskan perayu-perayu)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Kedua-dua perayu ditangkap di bilik tidur utama. Tiada dadah yang dijumpai di bilik tidur utama. Tiada kunci rumah tersebut yang dirampas daripada kedua-dua perayu. Dalam hal ini, kehadiran semata-mata dalam salah satu daripada empat bilik di dalam rumah tersebut, tanpa lebih, tidak menunjukkan bahawa kedua-dua perayu mempunyai atau kelihatan mempunyai jagaan atau pengurusan rumah tersebut dan anggapan bahawa mereka adalah penghuni tidak boleh dibangkitkan.

(2) Sabitan perayu-perayu adalah sama sekali tidak selamat. Terdapat keterangan bahawa orang lain mempunyai jagaan dan kawalan ke atas rumah tersebut dan dengan itu, mempunyai akses ke atas rumah tersebut. Keterangan menunjukkan kemungkinan orang lain yang boleh meletakkan dadah-dadah tersebut di situ. DW3 menghuni bilik di sebelah dapur manakala Chee Chai, yang merupakan penghuni rumah tersebut, memilik eks. P57 dan Chee Chai adalah orang yang telah menulis 'jangan sentuh' dan melekatkannya pada eks. P57. Terdapat juga keterangan bahawa Chee Chai mempunyai milikan ke atas eks. P77 yang mana beberapa hari sebelum itu, dia telah menawarkan dadah-dadah tersebut yang

terdapat dalam eks. P77 kepada DW3 and dua yang lain. Walau bagaimanapun, hakim bicara gagal untuk menimbangkan secara kritis dan kehakiman akan keseluruhan keterangan berpihak kepada perayu-perayu. Ini adalah satu ketiadaan arahdiri oleh hakim bicara yang terjumlah kepada salah arah oleh mahkamah, sekaligus mewajarkan campur tangan rayuan.

Case(s) referred to:
Er Ah Kiat v. PP [1965] 1 LNS 37 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
PP v. Lai Ah Bee [1974] 1 LNS 119 HC ***(refd)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086; [1992] 4 CLJ (Rep) 285 SC ***(refd)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 182A, 289(a)
Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B(1)(a), 39B(2)
Penal Code, s. 34

For the appellants - Gooi Soon Seng; M/s Gooi & Azura
For the respondent - Siti Rafidah Zainuddin; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-198-2009]

Reported by Najib Tamby

JUDGMENT

Azahar Mohamed JCA:

[1] Koo Wing Cheung (first appellant), a Hong Kong national, and Fan Ting Ting (second appellant), a Chinese national, were charged and tried together for trafficking in 54.1g of methamphetamine before the Shah Alam High Court, an offence in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), and punishable with mandatory death penalty prescribed under s. 39B(2) of the DDA read with s. 34 of the Penal Code ('Code').

[2] The offence was said to have been committed on 7 March 2009 at about 5.30am at a double-storey house number 25, Jalan Pekaka 8/10, Seksyen 8, Kota Damansara, Petaling Jaya, in the

A District of Petaling, in the State of Selangor Darul Ehsan. Both the appellants were said to act in concert in furtherance of a common intention to traffic the drugs. The offending drugs were found by the police hidden in the kitchen cabinet and in the cupboard in a room in the said house.

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[3] After the conclusion of the case for the prosecution, the learned trial judge came to the finding that the prosecution had made out a *prima facie* case against both the appellants and therefore called upon them to enter their defence in respect of the C offence charged.

[4] At the conclusion of the trial, the learned trial judge found that both the appellants could not be said to be trafficking in the drugs but convicted the appellants with one of possession under s. 12(2) of the DDA, punishable under s. 39A(2) of the DDA D read with s. 34 of the Code. Both the appellants were sentenced to 18 years imprisonment from the date of sentence. The first appellant was also sentenced to the mandatory ten strokes of whipping. By virtue of s. 289(a) of the Criminal Procedure Code ('CPC'), sentence of whipping is forbidden on the second E appellant, a female. The appellants then appealed to this court. We heard their appeal, wherein at its conclusion we unanimously allowed it. As a result, the convictions were quashed and the sentences set aside. We now give our reasons.

F **[5]** Very briefly the facts giving rise to the charge against both the appellants are as follows. On 6 March 2009 at about 2.30pm, Inspector Muhammad Ikhbal bin Mohd Isa ('PW11') attended a briefing given by ASP Balasubramaniam regarding a drugs operation. After the said briefing, at about 4pm PW11 and a team G of police officers went to the address as stated in the charge to carry out surveillance on the house.

[6] On 7 March 2009 at about 5.30am, the police raided the house. PW11 instructed his men to cut open the fence beside the H house and gained entry through the sliding door by cutting open the padlock and the grille of the sliding door. Upon gaining entry, PW11 and his team rushed inside. PW11 then instructed SM Mohd Dalia bin Mansor ('PW12') and his team to conduct a search on the upper floor of the house. Meanwhile PW11 I remained at the ground floor.

[7] Both the first and second appellants were arrested by PW12 in the master bedroom at the upper floor and they were handed over to PW11 at the ground floor. PW11 conducted a body search on both the appellants but nothing incriminating was found.

[8] Subsequently PW11 and his team conducted a thorough search in the house. Among others, PW11 found substances, which were later confirmed by the chemist to be methamphetamine, hidden in two separate places in the house as follows:

(i) 33g in a bottle inside a cabinet in the kitchen on the ground floor; and

(ii) 21.1g in a plastic container in the cupboard drawer in the second room on the upper floor.

[9] A search in the master bedroom at the upper floor where both the appellants were arrested did not find anything incriminating.

[10] Upon their defence being called, both the appellants elected to give sworn evidence. According to the first appellant, he was staying in an apartment on the ninth floor at Block C along Jalan Tun Razak opposite the Indonesian Embassy from January 2009 to 5 March 2009. On 27 February 2009, he entered Singapore through Sultan Iskandar Complex and stayed in Singapore for about eight days and entered Malaysia through the same complex on 6 March 2009. It is to be noted this version was corroborated by the first appellant's passport (see exh. D201).

[11] The first appellant further testified that on 6 March 2009, one Chee Chai fetched him from Johor Bahru back to Kuala Lumpur where they picked up the second appellant in Jalan Tun Razak, Ampang, Kuala Lumpur for food and drinks. Incidentally the first appellant's rented apartment had expired and he needed to stay in Kuala Lumpur for a few more days before flying to Indonesia and the second appellant needed to obtain a visa to enter Indonesia. At the suggestion of Chee Chai, the first appellant agreed to move into Chee Chai's rented house in Kota Damansara (place of incidence) together with the second appellant.

According to the first appellant, Chee Chai fetched both the appellants to his rented house in Kota Damansara on late afternoon on 6 March 2009. Upon reaching the said place, both the appellants met Or Chi Kwan ('DW3'), Ah Poon, Ah Soon and two other ladies whom they do not know. Chee Chai asked both the appellants to stay in the master bedroom because that was the only room with a double bed. The first appellant testified that DW3 stayed in a room situated on the ground floor and that Chee Chai stayed in a room on the upper floor opposite the master bedroom. Both the appellants were not given any keys to the said house. When Chee Chai, DW3, Ah Poon, Ah Soon and the two ladies left the house, both the appellants went to bed. According to the first appellant, whilst they were asleep, the police raided the said house and found drugs in a room on the upper floor and in the kitchen.

[12] The second appellant's evidence basically corroborated the first appellant's evidence relating to their stay in the apartment at Jalan Tun Razak and their shifting into Chee Chai's rented house on 6 March 2009.

[13] According to both the appellants, they had never seen the said drugs at any time before the raid and had no knowledge of the same.

[14] In his testimony, DW3 said that he moved into Chee Chai's rented house in Kota Damansara at the request of Chee Chai at the end of February 2009. Whilst he was staying there and before both the appellants shifted in, he saw the plastic container (exh. P77) containing the drugs seized by the police from a room on the upper floor and he knew that it contained drugs because Ah Soon gave the said drugs to Chee Chai and Chee Chai offered the said drugs to them for consumption. According to DW3, this happened on the second or third of March 2009. After consuming the said drugs, DW3 did not know where P77 was kept. DW3 further testified that after he had shifted into Chee Chai's rented house, Chee Chai told him not to touch the bottle (exh. P57) containing the drugs which the police seized from the cabinet in the kitchen. According to DW3, he saw Chee Chai writing in Chinese character "do not touch" and then pasted it on P57.

[15] Before us, learned counsel for the appellants argued that the learned trial judge had erred in finding both the appellants guilty of the possession charge on the principal ground that he had failed to appreciate that the defence had created a reasonable doubt and/or rebutted the presumption of possession on the part of both the appellants. It was argued that the drugs found in the kitchen and the drugs found in the room on the upper floor belonged to one Chee Chai. Learned counsel emphasised the point that both the appellants were arrested in the master bedroom and that their passports and the keys to the house were not recovered from their bodies or from the said house. According to learned counsel, there was no evidence that their clothings were found hanging in the master bedroom or in the house. From the primary facts adduced by the prosecution, learned counsel argued, it can be inferred that others were occupying the said house besides both the appellants.

[16] On the facts of the case, we find there is much merit in the arguments of learned counsel. In the first place, we note that the defence had consistently revealed the general position of the appellants at the earliest possible stage through the cross-examination of the relevant prosecution's witnesses, in particular PW11, at the trial. It follows from this that the defence of both the appellants in the present case was not something that was sprung for the first time in the defence case (see: *PP v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 4 CLJ (Rep) 285; [1992] 2 MLJ 561).

[17] According to DW3, he stayed in the house raided by the police on 7 March 2009 since late February 2009. DW3 stayed in the room on the ground floor next to the kitchen after Chee Chai's brother and his girlfriend went overseas. DW3 identified the clothings and the toothbrush in the said room as his belongings. According to DW3 when he moved into the said premises, Chee Chai told him not to touch the bottle P57. DW3 testified that he saw Chee Chai writing in Chinese character "do not touch" and pasted it on the bottle. Here, we note that the prosecution put to DW3 that the 33g of drugs in P57 found in the kitchen belonged to DW3. Furthermore, according to DW3, he saw Ah Soon bringing a plastic container, P77 and gave the said container to Chee Chai. Chee Chai then took it and gave it

A to them for their consumption. The prosecution also put to DW3 that the drugs in P77 belonged to DW3. In perusing the record of appeal, we find that these pieces of evidence by DW3 had remained unshaken.

B **[18]** It is important to note that a Perodua Myvi was seen at the said house by PW11 while carrying out surveillance on 6 March 2009. Another significant point to note is that a Proton Wira which was seized from the porch of the said house did not belong to either of the appellants. Photographs tendered at the trial show C that the other rooms were occupied. These are favourable evidence to the appellants appearing from the prosecution evidence in this case.

[19] Therefore, against the backdrop of the above defence, in our D judgment, the learned trial judge was duty-bound to take into account and give proper weight to the matters to which we have adverted to. In this case, both the appellants were arrested in the master bedroom. There were no drugs recovered in the master bedroom. No keys to the said house were recovered from either E of the appellants. In this regard, mere presence in one of the four rooms of the house without more did not show that both the appellants had or appeared to have the care or management of the house and the presumption that they were occupier could not be raised (see: *PP v. Lai Ah Bee* [1974] 1 LNS 119; [1974] 1 F MLJ 74). It should perhaps be emphasised that there was evidence that other persons had custody and control of the house, and hence had access to the house. As we have indicated earlier, a Perodua Myvi was seen at the said house by PW11 while carrying out surveillance on the house and that a Proton G Wira which was seized from the porch of the said house did not belong to either of the appellants. The evidence points to the possibility of some other persons who could have placed the offending drugs there. There was evidence that DW3 stayed in the room next to the kitchen on the ground floor. There was also H evidence that Chee Chai was the occupier of the said premises. There was evidence that Chee Chai was in possession of P57 which contained the drugs and that it was Chee Chai who wrote the words "do not touch" and pasted the same on P57. There was evidence that Chee Chai had possession of P77, a few days I before when he took out P77 and offered the drugs contained in

P77 to DW3 and two others. All these were never judicially and adequately considered by the learned trial judge in his judgment. The learned trial judge had failed to view the evidence of the defence objectively and from all angles. Now, by virtue of s. 182A of the CPC at the conclusion of the trial, the learned trial judge must consider all the evidence adduced before him and shall decide whether the prosecution had proved its case beyond reasonable doubt. As a result, the learned trial judge had failed to give the evidence adduced by the defence its due weight and importance and which if duly considered was capable of raising more than a reasonable doubt in the case of the prosecution against both the appellants (see: *Yusoff Kassim v. PP* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376). The learned trial judge failed to critically and judicially appreciate the entire evidence in favour of the appellants. In our judgment, the failure to take into consideration the entire evidence adduced by the defence and the failure to undertake judicial appreciation of the defence, as we have highlighted above, amounted in effect to a failure to consider a defence which had been put forward. In our view, this is a serious non-direction which amounts to a misdirection by the court below warranting appellate intervention (see: *Er Ah Kiat v. PP* [1965] 1 LNS 37; [1965] 2 MLJ 238). In this regard, Edgar Joseph Jr SCJ in *Gooi Loo Seng v. PP* [1993] 3 CLJ 1; [1993] 2 MLJ 137 said:

> Clearly, therefore, the trial Judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for, in the words of Pickford J in *R v. Bundy* 5 Cr App R 270:
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> > the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.
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> We must treat the failure of a trial Judge sitting alone, to direct himself correctly in the same as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

A **[20]** After having scrutinised the entire evidence contained in the appeal records with care and carefully examined the judgment of the learned trial judge and for all the reasons already given, we were of the view that the appellants' convictions were wholly unsafe. This appeal was, therefore, allowed. Accordingly, we
B quashed and set aside the convictions and sentences against both the appellants. Both the appellants were acquitted and discharged.

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